

## STEP-BY-STEP GUIDE FOR ASSET RECOVERY

### SOUTH AFRICA

#### INTRODUCTION

- 1) South Africa has a two ways of doing asset forfeiture:
  - a) a conviction based system similar to the British system in Chapter 5 of the Prevention of Organised Crime Act, 1998 (**POCA**)
  - b) a non-conviction based system similar to the US and British systems in Chapter 6 of POCA.
- 2) POCA applies to all offences, and chapter 6 also applies to unlawful activities that may not be offences. There are also specific provisions that apply terrorism linked offences.

#### Conviction based or criminal forfeiture in chapter 5 of POCA

- 3) **Confiscation orders**

The conviction based forfeiture is benefit based, ie that state obtains a judgment (called a **confiscation order**) against the defendants for the value of the proceeds that came into their possession. The amount of the order may not be more than the value of the realisable property of the Defendants (see below).
- 4) **Realisation orders**

If the judgement amount is not paid voluntarily by the Defendants, the state can obtain a realisation order to sell off their property to satisfy the judgement amount as in a normal civil case. The property need not be proceeds of crime, and it includes clean or untainted property, as well as gifts that they made to others.
- 5) **Realisable property that may be frozen and sold**

Such property is called realisable property and includes:

  - a) any property directly owned by the Defendants
  - b) any property beneficially owned by the Defendants
  - c) any property owned by persons or entities to whom the Defendants made gifts, to the value of those gifts, for example money hidden in a trust or given to their family members
- 6) **Restraint or freezing orders**

To ensure that the realisable property is not dissipated, the state may obtain a restraint or freezing order over any such property until the case is finalised. This includes clean or untainted property belonging to persons or entities who received gifts to the value of the gifts.
- 7) **Calculating the value of the benefit**

In calculating the value of the benefit, the court takes into account the full value of the proceeds of crime received by the Defendants, including from:

  - a) the offences of which they have been convicted or
  - b) any criminal activity which the court finds to be sufficiently related to those offences (this may include criminal activity of which the defendant has not been convicted).

**8) Curator bonis to take care of frozen property**

To look after the frozen property, the court may appoint a curator bonis (known in other jurisdictions as a receiver or trustee). The curator may also order any person to surrender realisable property or authorise the police to seize such property.

**Non conviction based or civil forfeiture in chapter 6 of POCA**

**9) Proceeds and instrumentalities of unlawful activities**

Non-conviction based or civil forfeiture provides for the forfeiture of:

- a) the actual proceeds of all unlawful activities.
- b) instrumentalities of serious offences referred to in Schedule 1 of POCA.

- 10) It is applicable even when there is no prosecution or the accused has been acquitted.
- 11) Unlike chapter 5, it must be proved that the property itself is proceeds or an instrumentality of unlawful activities, and only the actual tainted property can be frozen and forfeited.
- 12) There are two compulsory stages to the application as with Chapter 5, except that a freezing order is compulsory.
- 13) As in chapter 5, a Court may also appoint a *curator bonis* to look after the frozen property.

**HOW TO SEEK RESTRAINT/PRESERVATION AND CONFISCATION/ FORFEITURE FROM SOUTH AFRICA**

- 14) Any assistance required by a foreign jurisdiction where it is expected that legislative powers need to be invoked to provide assistance, require a formal request for mutual legal assistance via the Central Authority, which is the Department of Justice and Constitutional development.
- 15) Informal requests relating to asset forfeiture, can be sent directly to the Asset Forfeiture Unit in the National Prosecuting Authority. Under these circumstances only information which is publicly available can be provided.
- 16) In order to seek the restraint, seizure and forfeiture/confiscation of criminal proceeds from South Africa, the following steps should be followed.

**Identification of the asset**

- 17) In order to identify assets or the proceeds of corruption held within South Africa, the requesting state must first determine whether the request is formal or informal.
- 18) It will be necessary to identify the suspect and any other party who may have an interest in the property and all related entities through which he/she may hold property including companies, businesses, trust and family members.
- 19) Assistance with the identification of assets in South Africa can mostly be provided without a formal mutual legal assistance request if the required information is available to the public, for example:
  - a) Government held property ownership records including fixed property, motor vehicles, vessels and aircraft.
  - b) Corporate records showing shareholders of registered corporations.

- c) Records of registered trusts and their beneficiaries.
- 20) Assistance that require the use of law enforcement powers will require a formal Mutual Legal Assistance Request, for example:
- a) Information such as contents of bank accounts statements or other confidential material;
  - b) Formal interviews and statements, etc.

### **Confiscation or forfeiture of property relating to foreign offences**

21) SA is able to register an existing asset forfeiture order of the requesting country as part of a formal request for mutual legal assistance. These can be registered in SA and have the effect of an order issued by an SA court.

22) Alternatively SA can obtain its own orders based on SA legislation.

### **23) Formal letter of request aimed at registering an existing foreign order**

- a) Where the requesting state would like SA to register a foreign restraint or preservation order the following information will be of assistance:
  - i) A copy of the restraint application;
  - ii) A certified copy of the actual restraint/preservation order (see sec 24(2));
  - iii) The address of the person/entities against whom the restraint/preservation order was made (see sec 24(3) and (4));
  - iv) Confirmation that the order was granted by a court of law (see sec 26(1)(b));
  - v) Confirmation that the court who granted the order in the requesting state had jurisdiction in the matter (see sec 26(1)(b));
  - vi) Confirmation that the order is not subject to review or appeal in the requesting state (see sec 26(1)(c));
  - vii) Confirmation that it will be in the interest of justice to enforce the restraint/preservation order (see sec 26(1)(d));
  - viii) Confirmation that the foreign restraint/preservation order has not been satisfied in full (see sec 26(1)(e)).
- b) Where the requesting state would like SA to register a foreign confiscation or forfeiture order the following information will be of assistance:
  - i) A copy of the confiscation/forfeiture application;
  - ii) A certified copy of the actual confiscation/forfeiture order (see sec 20(3));
  - iii) The address of the person/entity against whom the confiscation/forfeiture order was made (see sec 20(4) and (5));
  - iv) Confirmation that the order is final and not subject to review or appeal (see sec 20(a));
  - v) Confirmation that the order was granted by a court of law (see sec 20(b));
  - vi) Confirmation that the court which made the order had jurisdiction to do so (see sec 20(b));
  - vii) Confirmation that the person against whom the order was made or anybody with an interest in any property that was forfeited, had the opportunity of defending himself or herself (see sec 20(c));
  - viii) Confirmation that the order cannot be satisfied in full in the requesting state (see sec 20(d));
  - ix) Confirmation that the order is enforceable in the requesting state (see sec 20(e));
  - x) Confirmation that the person concerned holds property in the SA or that the some or all of the forfeited property is in SA (see sec 20(f));

- xi) Confirmation that the person against whom the order was made or any interested party in property against which a forfeiture order was made, did appear at the proceedings concerned or did receive notice of the said proceedings as prescribed by the law of the requesting state or, if no such notice has been prescribed, that he or she did receive reasonable notice of such proceedings so as to enable him or her to defend him or her at the proceedings (see sec 22(1)(d));
  - xii) Confirmation that it will be in the interest of justice to enforce the confiscation/forfeiture order (see sec 22(1)(e));
  - xiii) Confirmation that the foreign confiscation/forfeiture order has not already been satisfied in full (see sec 22(1)(f)).
- 24) **Formal letter of request aimed at requesting SA to obtain its own orders in relation to proceedings which are pending in the requesting state**
- a) In order for SA to obtain any order on behalf of a foreign jurisdiction full particulars have to be provided by the requesting state which will show on a balance of probability that:
    - i) In the case of a request that SA obtain its own restraint order evidence under oath indicating the following will be of assistance:
      - (1) That the person has been or is to be charged in the requesting state;
      - (2) The charges to be put against the party against whom the restraint order is sought;
      - (3) That the person may be convicted of the offences referred to in the previous paragraph;
      - (4) That the person benefitted from (received or retained the proceeds of unlawful activity) the alleged offences,
      - (5) The alleged value/amount of the benefit and how it has been calculated.
    - ii) In the case of a request that SA obtain its own preservation/forfeiture order evidence under oath indicating the following will be of assistance:
      - (1) That the property to be preserved/forfeited is or represent either the proceeds of a crime that is identified or is an instrumentality of a schedule 1 offence. This requires a link to be established between the property to be seized and the alleged crime.

## **DISPOSAL/RETURN OF ASSETS**

- 25) In order to return forfeited assets to a foreign State, a formal or informal sharing agreement must be reached between the Central Authority and its counterpart in the foreign jurisdiction.

## **ASSET RECOVERY AGENCY/ AGENCIES – CONTACT INFORMATION**

- 26) Formal request should be addressed to:

Central Authority for the Republic of South Africa  
 Department of Justice and Constitutional Development  
 Private Bag X81  
 PRETORIA 0001  
 Republic of South Africa  
 Telephone number: +27 (12) 315 1446  
 Telefax number: +27 (12) 315 1557  
 e-mail : asello@justice.gov.za  
 Internet: www.doj.gov.za

27) Informal requests concerning asset forfeiture can be forwarded to:

The Asset Forfeiture Unit  
Private Bag x752  
PRETORIA 0001  
Republic of South Africa  
Telephone number: +27 12 345 6000  
Telefax number: +27 12 804 7335  
e-mail : [ejute@npa.gov.za](mailto:ejute@npa.gov.za)  
Internet: [www.npa.gov.za](http://www.npa.gov.za)

28) South Africa is a member of ARINSA and an observer member of Carin.